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No. 91-1538

In The

Supreme Court of the United States

October Term, 1992

SANDRA JEAN SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

ANTARCTICA IS NOT A "FOREIGN COUNTRY" FOR THE PURPOSES OF THE FTCA.

1. The United States has tried mightily to complicate this straightforward case of statutory interpretation. At issue are two, innocuous words of the Federal Tort Claims Act

(FTCA) which exclude claims arising from a "foreign country," 28 U.S.C. § 2680(k), and their applicability to the sovereignless region of Antarctica. Petitioner has acknowledged that the words "foreign country" are capable of two meanings, imputing *either* any place beyond the territorial sovereignty of the United States *or* locations under the sovereignty of a foreign nation. If the Court had no further guidance from the statute and its drafting, the interpretation of the phrase "foreign country," which had so bedevilled earlier courts, would be problematic here.

We do, however, have instruction in the form of this Court's earlier holding on the "foreign country" exception in *United States* v. *Spelar*, 338 U.S. 217 (1949), where the Court noted that Congress was "unwilling to subject the United States to liabilities depending upon the laws of a foreign power." *Id.* at 221. Under this logic, because Antarctica is sovereignless and has no civil tort law of its own, it cannot be a "foreign country." Despite the United States' intimations to the contrary, Resp. Br. 28-32, this Court's previous identification of this critical purpose of the "foreign country" exception is sound and perfectly consistent with the remaining language of the statute (particularly the FTCA's choice of law command) and the balance of the sparse legislative history.

The United States would, apparently, wish for this Court to scuttle the *Spelar* rationale and replace it with an admittedly "bright-line" rule of categorically excluding all claims arising beyond the territory of the United States. The government forgets that *Spelar*'s emphasis, in determining whether a foreign law is in force in a particular region, has served our courts well in the past. There never has been any misunderstanding of this fundamental purpose of the "foreign country" exception. The United States' claim, Resp. Br. 29

n.15, that the reaffirmation of the *Spelar* principle to Antarctica would work untold mischief, is belied by our courts having consistently understood the key Congressional intent in avoiding the application of foreign law to an FTCA action, and having not once been beguiled into making such a misstep. Nor, for reasons which have already been explained, Pet. Br. 30-31, would foreign law ever be applied in an FTCA case arising from Antarctica.[1]

The United States has, as it must, conceded that Antarctica is a sovereignless place having no civil tort law of its own. Resp. Br. 4, 23 ("Antarctica has no sovereign . . . ."). To be sure, the Respondent prefers to characterize Antarctica as "disputed territory." That does not change the fact that under the current international legal régime for the Southern continent, no nation can purport to exercise territorial sovereignty there. Under the rationale in *Spelar*, Antarctica cannot be a "foreign country."

2. a. Realizing that its interpretation of the "foreign country" exception runs counter to Congress's fundamental intent, as enunciated in *Spelar*, the United States has chosen to rely totally on the canon of statutory construction that Congress does not typically intend to legislate abroad, what

[1] The government's scenario, Resp. Br. 18 n.8, suggesting that a foreign tort law *could* intrude in an FTCA action from Antarctica, is inept as a hypothetical, and also plain wrong in its conclusion. The government posits that a foreign national, once injured by the United States' negligence in Antarctica, would rush to become an American resident in order to secure a venue. Quite apart from the small problem of the FTCA's two-year statute of limitations, 28 U.S.C. § 2401(b), and other bars to acquiring residency in this country, there remains the point that the U.S. forum would still apply its own law to this action and not the law of the plaintiff's earlier domicile, which had been affirmatively abandoned.

is known as the *Foley* presumption.[2] But this Court has recently said in *EEOC* v. *Arabian American Oil Co.*, 111 S.Ct. 1227 (1991), that the rule of construction in *Foley* only "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* at 1230 (*citing McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963)). The government has realized, of course, that because Antarctica is sovereignless and has no tort law of its own, there can be no clash "between our laws and those of other nations." Indeed, the *Foley* presumption reinforces the outcome suggested by the Petitioner in this case.

Undeterred, the United States has decided to create

[2] The United States seems to put some faith, Resp. Br. at 20-21, in the canon of statutory construction that waivers of sovereign immunity are to be construed narrowly in favor of the government. Petitioner agrees that it must convince this Court that her reading of the FTCA's "foreign country" exception is logical and reasonable in application to Antarctica. Aside from this, presumptions and other principles of statutory construction "are not rules of law but merely axioms of experience." *Weinberger* v. *Rossi*, 456 U.S. 25, 28 (1982) (*quoting United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952)). And, as this Court has recently declared, "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation . . . ." *Connecticut Nat. Bank* v. *Germain*, 112 S.Ct. 1146, 1149 (1992).

Moreover, this Court noted last Term that it has "narrowly construed *exceptions* to waivers of sovereign immunity where that was consistent with Congress's clear intent, as in the context of the 'sweeping language' of the Federal Tort Claims Act. . . ." *United States* v. *Nordic Village, Inc.*, 112 S.Ct. 1011, 1014 (1992) (*quoting United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547 (1951)) (other emphasis added). If, as Petitioner argues, the fair and logical reading of the "foreign country" exception is that it does not apply to Antarctica, no canon of construction should prevent a holding of this Court to that effect.

some conflicts for its own benefit in this litigation. Resp. Br. 23-25. Petitioner does not discount the point that Antarctic affairs are the subject of delicate negotiations between the United States and the other Antarctic Treaty Consultative Parties (ATCPs). But, the government's additional contention that future FTCA claims from Antarctica could cause international friction is pure nonsense. As was earlier briefed, Pet. Br. 20-21, while the Antarctic Treaty prohibits assertions of *territorial* sovereignty, *see* Antarctic Treaty, Dec. 1, 1959, art. 4, para. 2, 12 U.S.T. 795, T.I.A.S. No. 4780, 402 U.N.T.S. 71, it freely permits a country to legislate the affairs of its nationals in Antarctica. For example, no nation has ever objected to the United States' extension of its penal or revenue laws to its nationals on the Southern continent.

Nor is any nation likely to object, as the United States fears, Resp. Br. 25, when the FTCA accords a remedy to American residents injured by the government's negligence in the Antarctic, while denying a domestic action to foreign domiciliaries. The reason that no objection would be raised is that such foreign nationals would *still* have a remedy: the time-honored practice of their own country making a diplomatic claim against the United States. So there is little merit to the government's contention that allowing FTCA suits to arise from Antarctica would cause international dissension.

b. But the United States' position goes further, Resp. Br. 25, arguing that when it comes to the extent of the *Foley* presumption -- and its concern over conflicts with foreign laws -- the executive's views ought to be given conclusive weight. Petitioner is deeply troubled by this proposed arrogation of the judicial function, which runs counter to the broader purpose of canons of construction in providing

certainty in statutory interpretation. It is assuredly not lost on this Court that the United States has been known to take admittedly contradictory views on the extraterritorial effects of Acts of Congress.[3]

The executive branch undoubtedly has good and sufficient reasons for taking the positions it does concerning the extraterritorial application of U.S. law. In this case, of course, the government desires to limit its exposure when it is negligent in Antarctica. Whatever the reason, it cannot outweigh the essential purpose of the FTCA's "foreign country" exception nor the proper role of canons of statutory construction in understanding it.

c. On a subsidiary point, the United States asserts (Resp. Br. 26) that the presumption against the extraterritorial application of U.S. law applies equally to sovereignless areas (including the high seas and Antarctica) even where there is no risk of conflict with another nation's laws. For this proposition it relies solely on *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). A close examination of this case reveals no such assertion. Indeed, the approach taken by the Court in *Amerada Hess* squarely contradicts the United States' position here.

The truth is, of course, that the *Foley* presumption was never really implicated in *Amerada Hess*. This Court decided that the "tortious act" exception to the Foreign

[3] *Compare* Brief of the EEOC at 25-26, *EEOC* v. *Arabian American Oil Co.*, 111 S.Ct. 1227 (1991) (Nos. 89-1838 & 89-1845) ("Title VII is unlikely to generate serious conflicts with the laws of individual foreign states.") and Reply Brief of the EEOC at 15-16, *id.* (noting that "international law does not foreclose the extraterritorial application of Title VII in the context of U.S. employers which discriminate against U.S. citizens.") *with* Resp. Br. 23-25.

Sovereign Immunities Act's (FSIA's) blanket immunity to jurisdiction over foreign states and instrumentalities did not apply, *by its very terms*, to the high seas. *Id.* at 439-40. The reason was that the "tortious act" exception was limited to "occurr[ences] in the United States," 28 U.S.C. § 1605(a)(5), and the term "United States" was elsewhere defined in the FSIA as all "territory and waters, continental and insular, subject to the jurisdiction of the United States." 28 U.S.C. § 1603(c).

Obviously, if the FTCA's "foreign country" exception had been structured identically to the FSIA model, Petitioner would have no case. But the FTCA *was* drafted differently. Indeed, it was designed in a way to permit claims arising outside of United States territory, as long as they were not from a place under a foreign sovereign. As Congress has manifestly assimilated activities by nationals in Antarctica to those occurring on the high seas, *see* Pet. Br. 20-23, there are persuasive grounds to infer that the FTCA allows Antarctic claims.

3. Petitioner has consistently asserted that the logic of the "foreign country" exception precludes the application of a foreign law to an FTCA action. Consequently, she recognizes, as noted *supra* at 3 n.1, that it is incumbent upon her to show this Court that foreign law will not intrude in this case -- or any other in a like posture. Petitioner believes she has satisifed this showing, but the government has raised the theoretical point that "[i]nternational conflict-of-laws principles cannot, by sleight-of-hand, be transformed into the law 'of' Antarctica within the meaning of Section 1346(b)." Resp. Br. 15. Petitioner will revisit this issue since it appears that the government truly does not comprehend the relevant choice of law principles here.

The government seems to believe that persons, relationships, transactions, and incidents sited in Antarctica are subject to no substantive law nor to any choice of law direction that would lead a court to a proper law to apply. This would strip our nationals in Antarctica of the protection that their own law affords. This result is contrary to public international law which recognizes that people in *terra nullius* places "are not deprived of the protection of the law merely because of the absence of state sovereignty." Ian Brownlie, *Principles of Public International Law* 177 (4th ed. 1990).

More significantly, the courts in this country have said that the law of their forum would be applied to tort actions "arising in regions having no law that civilized countries would recognize as adequate." *Cuba R.R. Co.* v. *Crosby*, 222 U.S. 473, 478 (1912); *see also*, *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 355-56 (1909); *Slater* v. *Mexican National R. Co.*, 194 U.S. 120, 129 (1904); *Walton* v. *Arabian American Oil Co.*, 233 F.2d 541, 545 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956). In short, the old notion of "personal sovereignty," adopted from Britain, was specifically designed, and is still used,[4] to close the lacunae that the government believes to exist in Antarctica.

The weakness in the government's reasoning that Antarctica is "lawless," and thus there is no law to apply in this case, is illuminated by examining the situation on the

[4] Modern writers continue to endorse this doctrine, despite the fact that there are exceedingly few places on earth without their own civil tort law. *See 2 Dicey and Morris on the Conflict of Laws* 1376 n.29 (Lawrence Collins 11th ed. 1987) ("The case for displacement [of the *lex loci delicti* in favor of the law of the forum] is also strong in the more unlikely example of a tort committed by one member of a group of explorers against another in an uninhabited country.").

high seas. Our courts have repeatedly refused to bar claims on the ocean due to a lack of substantive law. As this Court stated in *The SCOTLAND*, 105 U.S. 24 (1881), "if a collision occurs on the high seas, where the law of no particular State has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would prima facie determine them by its own law as presumptively expressing the rules of justice . . . ." *Id.* at 29. In that courts have successfully dealt with the lack of substantive law on the high seas for hundreds of years, the same principle is applicable in this case.

If this were a tort case between two private litigants, the import of the government's argument is that there would be no law to apply in the action, and it would have to be dismissed. We know that this result is heartily disapproved, and yet the United States seeks to insulate itself from liability nonetheless. It is well-established, however, that another key intent behind the FTCA was to make the United States liable under the same terms as private individuals. The statute clearly states as much, 28 U.S.C. § 2674, and this Court has so confirmed. *See Indiana Towing Co., Inc.* v. *United States*, 350 U.S. 61, 64 (1955).[5]

Although Antarctica is sovereignless and thus lacks its own substantive law, choice of law principles fill the gap and predictably refer a forum to its own law to govern torts arising on the Southern continent. Whether one employs the

[5] *See also Tort Claims Against the United States: Hearings on H.R. 7236 before Subcomm. No. 1 of the Committee of the Judiciary*, 76th Cong., 3d Sess. 5 (1940) ("In effect, the United States is a corporation, exercising all the privileges and functions of a corporation, and should be answerable to its citizens for its wrongs in no less a degree than a private person or a body corporate.").

traditional rule of personal sovereignty or the Conflicts *Restatement* interest-balancing approach, the outcome is the same: Oregon law is applied as the law of the Petitioner's domicile, a law that her husband never abandoned by virtue of sojourning to Antarctica, and dying there.

The government's attempt to obfuscate the choice of law direction in the FTCA flies in the face of a simple truth: our domestic legal order will not tolerate our nationals working in Antarctica without the protection afforded by law. In large measure that protection has been provided by Congress in punishing citizens in Antarctica and taxing their income earned there. This treatment is totally consistent with the international legal status of Antarctica. Likewise, the underlying rationale of the FTCA itself supports a holding that Antarctica is not a "foreign country."

CONCLUSION

For the foregoing reasons, and those set forth in the Petitioner's opening brief, the judgment of the U.S. Court of Appeals for the Ninth Circuit should be REVERSED.

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